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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY COLLEY, Defendant and Appellant.	B244939 (Los Angeles County Super. Ct. No. NA088132)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

Cary D. Gorden, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Johnny Colley appeals from a judgment following his probation violation. Appellant contends the trial court abused its discretion by refusing to grant his request to reappoint counsel prior to the sentencing on his probation violation. Finding no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 22, 2011, appellant entered a drugstore in Long Beach. He removed a clipper set from the box, placed it in his pants pocket, and walked out of the store without paying. He was apprehended by store security.

Appellant was charged in an amended information in case number NA088132 with petty theft with three priors, in violation of Penal Code section 666, subdivision (a).[1] It was further alleged that appellant had suffered eight prior convictions (§ 667.5, subd. (b)), and one prior "strike" conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

On April 14, 2011, appellant was granted propria persona (pro per) status. On July 28, 2011, appellant's pro per status was revoked, and the trial court appointed counsel. On November 4, 2011, the trial court granted appellant's motion to strike the prior "strike" conviction pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. Appellant pled nolo contendere to the charged count, and the court found him guilty as charged. Appellant also admitted the section 667.5, subdivision (b) allegations.

At the sentencing hearing on January 23, 2012, the trial court placed appellant on formal probation for five years under the following terms and conditions: (1) that appellant serve 672 days in county jail, less 672 days credit for

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[1] All further statutory citations are to the Penal Code, unless otherwise indicated.

time served; (2) that he pay $70 in assessed fees and a $200 restitution fine, (3) that he complete a one-year treatment program at Progress House, and (4) that he comply with various standard probation terms and conditions, including obeying all laws and orders of the court.

On February 27, 2012, the probation department reported that appellant was in violation of the treatment terms of his probation, because he left Progress House after one day. Probation was revoked, and a bench warrant was issued for appellant. On April 2, 2012, the court found appellant had violated his probation (in case No. NA088132) by committing a separate petty theft offense on February 17, 2012 (case No. NA091565). Appellant was represented by counsel at the April 2 hearing.

On July 11, 2012, the trial court denied appellant's motion to substitute counsel and granted his request for pro per status for subsequent proceedings.

On October 17, 2012, the trial court denied appellant's discovery motion for production of a videotape in his new theft case. The court then proceeded with sentencing on the probation violation. Appellant contended that the prior judge had imposed and suspended a four-year sentence. Upon review of the file, the court determined that no sentence had been imposed, but that appellant had been placed on five years probation. As the judge and prosecutor discussed the potential sentence, appellant interjected, "Wait a minute. I ain't doing no probation hearing today." The court explained that the prosecutor was not discussing a hearing, but rather how many prior prison terms appellant had served. The prosecutor then continued, and concluded that the maximum term was seven years. Appellant objected, arguing that the prior judge had not sentenced him to seven years. Rather, "[t]he judge gave me four years' joint suspension, five years' probation."

The court asked appellant if he had anything more to say. After first seeking to dismiss the new theft charge for failure to produce the videotape he had requested in discovery, appellant stated that he wanted to "waive the probation" until after the new case was over. Appellant said he needed time to marshal and present evidence for the probation violation hearing. Then he said, "actually, on the probation, I want to be represented by counsel." The court asked why appellant had waited to make that request. Appellant replied: "Because [the prosecutor was] talking about seven years. I don't know where he getting this from. So I rather have a lawyer . . . doing the probation hearing." The court stated: "I'm inclined to rule this is intended just to delay proceedings." The prosecutor agreed. The court denied appellant's request for counsel and stated that it was going to sentence appellant on the probation violation. Appellant responded that he did not want to be sentenced "today," and again asked for counsel. The court found that appellant's request was done only for the purpose of delay.

The court sentenced appellant to a total term of seven years in state prison, including the upper term of three years on count 1 (in case No. NA088132) plus four years for the four prior convictions pursuant to section 667.5, subdivision (b). The court imposed the upper term based upon appellant's prior criminal history and recent criminal conduct. Appellant received 1,106 days of custody credit. The new theft charge in case number NA091565 was dismissed.

Appellant timely appealed.

DISCUSSION

Appellant contends the trial court abused its discretion by refusing to grant his request for counsel before sentencing on his probation violation. We disagree.

In determining whether a trial court abused its discretion in denying a midtrial or posttrial request to appoint counsel for a criminal defendant who has

previously invoked his right to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), the reviewing court must "consider[] the totality of the circumstances surrounding defendant's revocation request." (*People v. Lawrence* (2009) 46 Cal.4th 186, 193 [midtrial request]; *People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1124-1125 (*Ngaue*) [posttrial request].) Relevant factors for consideration may include: "'(1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney.'" (*Lawrence*, *supra*, 46 Cal.4th at p. 192, quoting *People v. Elliott* (1977) 70 Cal.App.3d 984, 993 (*Elliott*), overruled on other grounds by *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.) Although consideration of the *Elliott* factors may suggest that counsel should be appointed for posttrial proceedings, "the trial court retains discretion to deny a request for posttrial assistance of counsel where the request is made for a bad faith purpose, and factors such as the defendant's history in substitution of attorneys or purpose to delay further proceedings may bear on the determination whether such a bad faith purpose exists." (*Ngaue*, *supra*, at p. 1126.)

Here, the timing of appellant's request for reappointed counsel suggests that the request was made in bad faith and for the improper purpose of seeking to delay the sentencing hearing. On July 11, 2012, appellant had requested and been granted his *Faretta* right to represent himself for sentencing on his probation violation and for his new theft case. At the October 17, 2012 hearing, after the court denied appellant's request for discovery in the new theft case, he repeatedly

sought to delay sentencing. Appellant first stated that "I ain't doing no sentencing hearing today." Then, he stated he wanted to "waive the probation" until his new theft case -- which was at a preliminary stage -- was over. Finally, he sought additional time to prepare his defense on the probation violation, before abruptly changing his mind and requesting reappointment of counsel. In short, under the totality of the circumstances, the trial court did not exceed the bounds of reason in denying appellant's request for the reappointment of counsel.

Moreover, we would find any error in denying the request was harmless, as it is not reasonably probable that appellant would have obtained a more favorable result if he had been represented by counsel. (*Ngaue*, *supra*, 229 Cal.App.3d at pp. 1126-1127 [error in denying defendant's posttrial retraction of *Faretta* waiver analyzed under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836], citing *Elliott*, *supra*, 70 Cal.App.3d at p. 998; accord *People v. Gonzalez* (2012) 210 Cal.App.4th 724, 744.) Appellant sought appointed counsel because he was apparently confused about the maximum sentence he faced on the probation violation. That potential sentence, however, was determined by statute. Moreover, the court imposed the upper term only after considering appellant's history of recidivism. It is not reasonably probable that appointed counsel would have persuaded the court to impose a lighter sentence. Thus, appellant cannot show that appointed counsel would have obtained a more favorable outcome. Accordingly, there was no error in the denial of appellant's request for reappointment of counsel.[2]

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[2] Appellant contends the error should be reviewed under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), citing *People v. Pompa-Ortiz*, *supra*, 27 Cal.3d 519 and *People v. Boulware* (1993) 20 Cal.App.4th 1753. Those cases are distinguishable, as they involved a denial of a request for reappointed counsel at the preliminary hearing

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.

(see *People v. Pompa-Ortiz*, *supra*, at p. 529; *People v. Boulware*, *supra*, at p. 1757). The denial of counsel at the preliminary hearing is federal constitutional error subject to *Chapman* harmless-error analysis. (*People v. Pompa-Ortiz*, *supra*, at p. 530, *citing Coleman v. Alabama* (1970) 399 U.S. 1, 11.) In contrast, this case involves a posttrial request for reappointment of counsel, which does not implicate the same constitutional concerns. (*Elliott*, *supra,* 70 Cal.App.3d at p. 998.) Moreover, even under *Chapman,* we would find the error harmless, as there is no reasonable possibility that any error in denying the request to reappoint counsel would have affected the sentence. (See *People v. Gamache* (2010) 48 Cal.4th 347, 399, fn. 22 [error that has no reasonable possibility of affecting verdict is harmless under *Chapman*].)